Supreme Court, U.S.
FILED
DEC 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1940

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

UNITED STATES OF AMERICA,
Petitioner,

v.

THE CHEROKEE NATION OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE CHEROKEE NATION

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QUESTION PRESENTED

Whether the United States, under the unique and special circumstances present in this case, can appropriate riverbed lands within that portion of the navigable Arkansas River flowing through the Cherokee domain in Oklahoma—solemnly guaranteed to the Cherokee Nation in treaties forever, and evidenced by solemn grant by the United States thereunder to it in fee simple; and held by the United States in trust for the use and benefit of said Indian Nation—and thus violate its trust obligations by exercising its navigational easement and divesting said vested tribal assets, and using said trust property for its own public purposes, without rendering, or assuming an obligation to render, just compensation to the Indian nation therefor.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT	1
1. Proceedings below	1
2. Nature of the case	3
3. Facts	4
SUMMARY OF ARGUMENT	15
ARGUMENT:	
PLAINTIFF'S LEGAL AND EQUITABLE CLAIM UNDER CLAUSES 1 AND 4, INDIAN CLAIMS COMMISSION ACT	17
A. The Fiduciary Relationship	17
B. The Fifth Amendment Taking	19
C. Navigational Servitude	23
D. The Taking of Private Property and the Right of Navigation	29
CONCLUSION	35
APPENDICES:	
A. Treaty with the Western Cherokee, May 6, 1828, 7 Stat. 311, 2 Kapp. 288	1a
B. Treaty with the Western Cherokee, February 14, 1833, 7 Stat. 414, 2 Kapp. 385	4a
C. Treaty with the Cherokee, December 29, 1835, 7 Stat. 478, 2 Kapp. 439	6a
D. Excerpts, Cherokee Patent of 1838	9a

TABLE OF AUTHORITIES

Cases: Page

Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) 16, 22
Atlantic and Pacific R. Co. v. Mingus, 165 U.S. 413 (1897) 16
Blue Jacket v. Johnson County, 72 U.S. (5 Wall.) 737 (1967) 24
Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922) 27
Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 9
Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902) 14
Cherokee Nation v. Southern Kansas Ry. Co., 135 U.S. 641 (1890) 22
Cherokee Nation v. United States, 9 Ind. Cl. Comm. 162 (1961) 28
Choate v. Trapp, 224 U.S. 665 (1912) 22
Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) 8, 13, 15, 16, 25, 26, 29
Creek Nation v. United States, 78 Ct. Cl. 474 (1933) 24
Creek Nation v. United States, 24 Ind. Cl. Comm. 238 (1970) 14
Creek Nation v. United States, 26 Ind. Cl. Comm. 410 (1971), 201 Ct. Cl. 386 (1973), 476 F.2d 1290 8
Federal Power Comm. v. Tuscarora Indian Nation, 362 U.S. 99 (1960) 22, 34
Fort Berthold Reservation v. United States, 182 Ct. Cl. 543 (1968), 390 F.2d 686 (1968) 21, 23, 34
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 28
Jones v. Meehan, 175 U.S. 1 (1899) 24
Kaiser Aetna v. United States, 444 U.S. 164 (1979) 25, 27, 31, 32, 33
Lynch v. Clements, 263 P.2d 153 (1953) 21
Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928) 18, 19
Menominee Tribe v. United States, 391 U.S. 404 (1968) 22

TABLE OF AUTHORITIES—Continued

Page

Monongahela Nav. Co. v. United States, 148 U.S. 312 (1893) 25
Montana v. United States, 450 U.S. 544 (1981) 29, 30
Moore v. United States, 157 F.2d 760 (9th Cir. 1946) 22
Otoe and Missouri Tribe v. United States, 131 Ct. Cl. 593, 131 F. Supp. 265 (1955), cert. den. 350 U.S. 848 2
Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 25
Seminole Nation v. United States, 316 U.S. 286 (1942) 18
Seminole Nation v. United States, 102 Ct. Cl. 565 (1945) 14
Shively v. Bowlby, 152 U.S. 1 (1984) 27
Sioux Nation v. United States, 220 Ct. Cl. 442 (1979), affirmed United States v. Sioux Nation, 448 U.S. 371 (1983) 20, 23, 34
Squire v. Capoeman, 351 U.S. 1 (1956) 22
State v. Nolegs, 139 P. 943 (1914) 21
The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870) 28
United States v. Cherokee Nation, 782 F.2d 871 (10th Cir. 1986) 24, 25
United States v. Creek Nation, 295 U.S. 103 (1935) 19, 20, 23, 24, 34
United States v. Cress, 243 U.S. 316 (1916) 24, 25
United States v. Holt State Bank, 270 U.S. 49 (1925) 27
United States v. Santa Fe Pacific Ry., 314 U.S. 339 (1941) 22
United States v. Willow River Power Co., 324 U.S. 499 (1945) 33
Victery v. Yahola Sand and Gravel Co., 12 P.2d 881 (1932) 21
Western Cherokee Indians v. United States, 27 Ct. Cl. 1 (1871) 10
Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 9

TABLE OF AUTHORITIES—Continued

Page

Treaties and Agreements:

Cherokee Treaties:

November 28, 1785, 7 Stat. 18, 2 Kapp. 8 4
July 2, 1791, 7 Stat. 39, 2 Kapp. 29 ..... 4, 5
June 26, 1794, 7 Stat. 43, 2 Kapp. 33 5
October 2, 1798, 7 Stat. 62, 2 Kapp. 51 5
October 25, 1805, 7 Stat. 93, 2 Kapp. 82 ..... 5, 6
July 8, 1817, 7 Stat. 156, 2 Kapp. 140 6
February 27, 1819, 7 Stat. 195, 2 Kapp. 177 6
May 6, 1828, 7 Stat. 311, 2 Kapp. 288 ..... 7, 8, 12, 15, 28, 32
February 14, 1833, 7 Stat. 414, 2 Kapp. 385 .. 9, 12, 15, 28, 32
December 29, 1835, 7 Stat. 478, 2 Kapp. 439 .. 10, 11, 12, 15, 28, 30, 32
July 19, 1866, 14 Stat. 799, 2 Kapp. 942 13

Cherokee Agreement:

March 8, 1813, 2 Kapp. 180 6

Acts of:

May 28, 1830, ch. 148, 4 Stat. 411 (Indian Removal Act) 8, 9
March 3, 1893, ch. 209, 27 Stat. 612 ..... 13, 14
June 28, 1898, ch. 517, 30 Stat. 495 (Curtis Act) .. 3, 14
July 1, 1902, ch. 1375, 32 Stat. 716 ..... 3, 14
April 26, 1906, ch. 1876, 34 Stat. 137, 148 ..... 15, 33
December 22, 1944, ch. 665, 58 Stat. 887, 895 (Flood Control Act) 3, 16, 17, 19, 21, 23, 33
July 24, 1946, ch. 595, 60 Stat. 634, 635, 636 (Rivers and Harbors Act) 3, 16, 17, 19, 21, 23, 33
August 13, 1946, ch. 949, 60 Stat. 1049, 1050 (Indian Claims Commission Act) 2, 3, 17
December 23, 1982, Pub. Law 97-385, 96th Cong., 96 Stat. 1944 (Jurisdictional Act) 35

Miscellaneous:

Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 Stan. L. Rev. 1213 (1975) 22

TABLE OF AUTHORITIES—Continued

Page

F. Cohen, *Handbook of Federal Indian Law* 73 (1982) 5, 9
Foreman, *Indian Removal* 229-233, 287, 294-312 (New Ed. 1953) 8, 10, 32
Georgia Compact of April 24, 1802, 28 Am. St. Papers, Public Lands vol. 1, 7th Cong., 1st Sess. 125 5
Hodges, *Handbook of American Indians*, Bull. 30, Pt. I, Bur. Amer. Eth., p. 245 4
Cherokee Patent of December 31, 1835 ..... 12, 13

United States Constitution:

Art. 1: Sec. 8, Clause 3 (Commerce Clause) 24, 27
Fifth Amendment 1, 2, 4, 17, 19, 23, 31, 33, 34

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BRIEF FOR THE CHEROKEE NATION

STATEMENT

1. Proceedings Below

The Cherokee Nation filed its Complaint on May 23, 1983, alleging that the construction of the McClellan-Kerr Navigation System had created a loss of its tribal assets in the Arkansas riverbed, held in trust by the United States for said nation of Indians, and constituted a taking of said assets by the United States under the Fifth Amendment to the Constitution of the United States. The United States answered that it had a navigational easement in the Arkansas River within the Cherokee domain, in the exercise of which no taking occurred.

The Court framed the following issues:

> 1. Whether the United States' navigational servitude in the Arkansas River prevents liability for an alleged fifth amendment taking of land held in fee by the Cherokee Nation?
>
> 2. Whether the exercise of a navigational servitude constituted the breach of some duty of care to plaintiff?

Pet. for Cert., App. C 25a.

Upon review of the briefs of the parties, the district court held that by treaty and patent the United States granted to the Cherokee Nation the full fee simple title, without a reservation of a navigational servitude in that part of the Arkansas River located within the Cherokee Nation; and that the Cherokee Nation had a vested property right in said riverbed, which was divested by action of the United States, for which just compensation must be paid the Cherokee Nation.

The district court decided the case under the first issue, and did not address the second issue, which is within the class of "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity". Section 2, Clause 5 of the Indian Claims Commission Act. *Otoe and Missouria Tribe v. United States*, 131 Ct.Cl. 593, 131 F.Supp 265 (1955), cert. den., 350 U.S. 848. The court found in favor of the Cherokees, certifying the case for interlocutory review. Pet. for Cert., App. C, 25a.

On appeal the circuit court affirmed, but on different grounds. The appeals court did not agree that the United States needed to have reserved its servitude in the patent. It was held this did not affect the fact that the Cherokees did have compensable property interests in the bed of the river. It was further held that just compensation must be paid for a taking of those interests.

The Cherokee Nation does not waive its right to have a determination of the case under Section 2, Clause 5 and should this Court disagree with the court of appeals decision under the first issue, it prays remand to the district court for a determination under Section 2, Clause 5 of the Indian Claims Commission Act, August 13, 1946, Ch. 949, 60 Stat. 1049, 1050.

2. Nature of the Case

By direct grant from the United States the Cherokee Nation received the full fee simple title to its domain in Indian Territory, now a part of the State of Oklahoma, including a portion of the Arkansas riverbed, a navigable stream located within the grant. The treaties and patent evidencing the grant, gave the Cherokee Nation fee simple absolute title in that portion of the Arkansas riverbed within the grant.

The United States took full administrative control over all of the property and affairs of the Cherokee Nation to carry out the provisions of the Curtis Act of June 28, 1898, ch. 517, 30 Stat. 495 and the Act of July 1, 1902, ch. 1375, 32 Stat. 716, and the allotment of its lands. The Arkansas riverbed was not allotted and remained Cherokee tribal property under the guardianship of the United States.

The United States, assuming that the State of Oklahoma owned the Arkansas riverbed within the Cherokee domain, authorized the construction of the McClellan-Kerr Arkansas River Navigation System under the Flood Control Act of December 22, 1944, ch. 665, 58 Stat. 887, 895, and the Rivers and Harbors Act of July 24, 1946, ch. 595, 60 Stat. 634, 635-636, by authority of which the Corps of U.S. Army Engineers altered the natural channel of the riverbed, destroyed the sand and gravel assets, and constructed three dams in the riverbed, two of which are generating electricity for profit, although not inuring to the benefit of the Cherokee Nation.

For the loss of its tribal assets thus taken the Cherokee Nation claims just compensation under the Fifth Amendment to the Constitution of the United States.

3. Facts

The Cherokee Nation is a Federally recognized nation of American Indians, whose aboriginal land holdings included parts of the present States of Kentucky, Virginia, North and South Carolina, Georgia, Tennessee, and Alabama. For centuries before the establishment of the United States the Cherokee people controlled over 70,000,000 acres of hunting domain. Hodges, Handbook of American Indians, Bull. 30, Pt. I, Bur. Amer. Eth., p. 245.

Beginning in 1785, the United States executed a treaty of peace and friendship with the Cherokee Nation, in which the boundaries between the lands of the Cherokee Nation and the United States were defined and the Cherokees acknowledged themselves "to be under the protection of the United States of America, and of no other sovereign whosoever." Treaty with the Cherokees, Nov. 28, 1785, art. 3, 7 Stat. 18, 2 Kapp. 8 (Commonly known as Treaty at Hopewell).

In 1791, the United States executed another treaty of peace and friendship with the Cherokee Nation, in which the boundaries between the lands of the Cherokee Nation were redefined in consideration of which the United States "solemnly guarantee to the Cherokee nation, all their lands not hereby ceded." Treaty with the Cherokees, July 2, 1791, art. 7, 7 Stat. 39, 2 Kapp. 29 (Treaty of Holston). The Cherokee Nation further acknowledged themselves "to be under the protection of the said United States of America, and of no other sovereign whosoever; and they also stipulate that the said Cherokee Nation will not hold any treaty with any foreign power, individual state, or with individuals of any state." *Id.* at art. 2. Additionally it was agreed "that the citizens and inhabi-

tants of the United States, shall have a free and unmolested use of a road from Washington district to Mero district, and of the navigation of the Tennessee river." *Id.* at art. 5.

As the white settlements expanded and encroached upon Cherokee lands the United States executed a series of treaties in which further cessions of lands were acquired from the Cherokee Nation. Treaty with the Cherokees, June 26, 1794, 7 Stat. 43, 2 Kapp. 33; Treaty with the Cherokees, October 2, 1798, 7 Stat. 62, 2 Kapp. 51.[1]

Even while the United States was making solemn guarantees to the Cherokee Nation regarding its diminishing lands, the Federal Government adopted a policy of completely extinguishing Indian title to the Cherokee aboriginal lands in the east.[2]

By 1803 the United States had acquired the Louisiana Purchase west of the Mississippi River, and it was soon proposed that the eastern tribes be relocated on these western lands. In yet another treaty with the Cherokees additional lands were ceded to the United States. Treaty

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[1] In the Treaty of 1798 the United States acquired the use of the Kentucky road as "an open and free road for use of citizens of the United States . . ." (*Id.* at art. 7).

[2] In an agreement known as the Georgia Compact made between the United States and the State of Georgia on April 24, 1802, Georgia ceded a large area of land to the United States. 28 Am.St.Papers, Public Lands vol. 1, 7th Cong., 1st Sess. 125 (1802). In return the Federal Government promised to extinguish Indian title to certain land within Georgia, but no procedure was specified for fulfilling that promise. While lands ordinarily disencumbered of the Indian occupancy title became part of the public domain, the Georgia pact allowed the lands to become the property of the State. Unfortunately, this redoubled Georgia's interest in Indian removal. F. Cohen, Handbook of Federal Indian Law 79 (1982), *citing* Abel, The History of Events Resulting in Indian Consolidation West of the Mississippi in 1 Ann. Rep. of the Am. Hist.A. 322.

with the Cherokees, Oct. 25, 1805, 7 Stat. 93, 2 Kapp. 82.[3]

By Treaty with the Cherokees, July 8, 1817, 7 Stat. 156, 2 Kapp. 140, the Cherokee Nation agreed to trade part of its lands in Georgia for an equal amount of land in Arkansas Territory;[4] and under the provisions of the Treaty with the Cherokees, February 27, 1819, 7 Stat. 195, 2 Kapp. 177, a number of Cherokees removed to lands provided for them in Arkansas Territory.[5] These Cherokees became known as western or "Old Settler" Cherokees.

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[3] In this treaty the United States acquired the free and unmolested use and enjoyment of two roads. (*Id.* at art. 4).

[4] This treaty provided for an acre-for-acre exchange for land along the Arkansas and White Rivers in what is now the State of Arkansas. It further provided "the United States reserving the right of establishing factories, a military post, and roads, within the boundaries above defined". (*Id.* at art. 5). As compensation for improvements left behind each Indian was to receive a rifle, ammunition, a blanket, a brass kettel or a beaver trap. (*Id.* at art. 6). It was "also provided by the contracting parties, that nothing in the foregoing articles shall be construed so as to prevent any of the parties so contracting from the free navigation of all the waters mentioned therein." (*Id.* at art. 9).

[5] This treaty forced the Cherokees to either remove to the west or accept 640 acre tracts as reservation lands. (*Id.* at art. 2). It further provided "that all white people who have intruded, or may hereafter intrude, on the lands reserved for the Cherokees, shall be removed by the United States . . ." (*Id.* at art. 5).

An additional agreement granted certain agents of the States of Tennessee and Georgia permission for a Turnpike Company to establish a public road between the Tennessee and Tugolo Rivers with compensation to the tribe. It provided "said company are to have the benefit of one ferry on Tennessee River, and such other ferry or ferries as are necessary on said road; and, likewise, said company shall have the exclusive privilege of trading on said road during the aforesaid term of time." Cherokee Agreement, March 8, 1813. 2 Kapp. 180. Treaties and Agreements of the Five Civilized Tribes, Institute for the Development of Indian Law, at 30.

Part of the Arkansas lands had been settled by whites, and the Western Cherokees executed the Treaty of May 6, 1828, 7 Stat. 311, 2 Kapp. 288, (*see* App. A) with the United States, in which the Western Cherokees ceded their lands in Arkansas, for lands therein described within the Indian Territory, now the State of Oklahoma. With respect to the lands in Indian Territory the United States "agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is solemnly pledged". *Id.* at art. 2. The intent of the parties is evident from a plain reading of the same:

> WHEREAS, it being the anxious desire of the Government of the United States to secure to the Cherokee nation of Indians, as well those now living within the limits of the Territory of Arkansas, as those of their friends and brothers who reside in States East of the Mississippi, and who may wish to join their brothers of the West, *a permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State; and, Whereas, the present location of the Cherokees in Arkansas being unfavorable to their present repose, and tending, as the past demonstrates, to their future degradation and misery; and the Cherokees being anxious to avoid such consequences, . . . still being anxious to secure a permanent home, and to free themselves, and their posterity, from an embarrassing connexion with the Territory of Arkansas, and guard themselves from such connexions in future; . . . do hereby conclude the following Articles, . . .

Id. at preamble.

The Federal government agreed to remove all intruders from the Cherokee lands in Indian Territory and keep

them out;[6] and reserved a military post within said lands at Fort Gibson, on the Grand River, and the right to run a road through Cherokee lands to and from said Fort.[7]

In 1829 the States of Georgia, Mississippi and Alabama extended their laws over the Cherokee domain, and the United States refused to intervene, claiming that the States had a right to do so. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 642-643 (1970); *Creek Nation v. United States*, 26 Ind. Cl. Comm. 410, (1971), 201 Ct. Cl. 386 (1973), 476 F.2d 1290 (1973); *See* Grant Foreman, Indian Removal, pp. 229-233 (New Ed. 1953).

Congress passed the Indian Removal Act of May 28, 1830, ch. 148, 4 Stat. 411, providing for the exchange of Indian tribal lands in the East for lands in the West, and the removal of tribes to land west of the Mississippi, and that the "United States will forever secure and guaranty to them and their heirs, or successors, the country exchanged with them," and that "the United States will cause a patent or grant to be made and executed to them

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[6] Article 3 provides "The United States agree . . . to remove . . . all white persons from the West to the East of said line, and also all others, should there be any there, who may be unacceptable to the Cherokees, so that no obstacles arising out of the presence of a white population, or a population of any sort, shall exist to annoy the Cherokees—and also to keep all such from the west of said line in future."

Article 8 provides that the western Cherokees "having . . . freed themselves from the harassing and ruinous effects consequent upon a location amidst a white population, and secured to themselves and their posterity, under the solemn sanction of the guarantee of the United States, as contained in this agreement, a large extent of unembarrassed country;"

[7] In Article 9 the United States reserved a 2 x 6 mile tract of land for Fort Gibson, and further provided "And the Cherokees agree that the United States shall have and possess the right of establishing a road through their country for the purpose of having a free and unmolested way to and from said Fort."

for the same". *Ibid.* The Act further provided that the tribes would "be protected, at their new residence, against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever." *Ibid.*

After the passage of this Act the Government pursued a more aggressive policy of trying to move the Eastern Cherokee Nation to the Cherokee lands west of the Mississippi River. The Cherokee Nation sought relief in the Courts in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). In *Worcester*, this Court recognized the sovereignty of the Cherokee Nation.[8]

The United States eliminated a conflict between the Cherokee and Creek Nations over the boundaries of the western lands by Treaty with the Western Cherokees, February 14, 1833, 7 Stat. 414, 2 Kapp. 385. (*See* App. B) In Article 1, the United States again "agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is solemnly pledged", the lands within the adjusted boundaries described in the treaty, with the proviso

> that if the saline, or salt plain, on the great western prairie, shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men, to get salt on said plain in common with the Cherokees—and letters patent shall be issued by the United States as soon as practicable for the land hereby guaranteed.

As of this time the major portion of the Cherokee nation still remained in the east. However, the white

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[8] The opinion emphasized the equality and "mutual consent" of the parties to the Treaty of Holston and described the agreement as containing "stipulations which could be made only with a nation admitted to be capable of governing itself". F. Cohen, Handbook of Federal Indian Law 73 (1982), citing *Worcester* 31, U.S. (6 Pet.) at 555-556.

settlements continued to expand and encroach upon the Cherokee lands there. Ultimately, the United States enforced upon the Cherokee Nation the Treaty of New Echota, December 29, 1835, 7 Stat. 478, 2 Kapp. 439, (*See* App. C) executed by a small group of eastern Cherokees, but never accepted as a valid treaty by the great majority of the Cherokee Nation. In 1838, the eastern Cherokees were moved by military forces of the United States to Cherokee lands west of the Mississippi River. *Western Cherokee Indians v. United States*, 27 Ct. Cl. 1 (1891). This removal is referred to as the "Trail of Tears".[9]

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[9] The history of this Cherokee removal of 1838, as gleaned by the author from the lips of actors in the tragedy, may well exceed in weight of grief and pathos any other passage in American history. Even much-sung exile of the Acadians falls far behind it in its sum of death and misery. Under Scott's orders the troops were disposed at various points throughout the Cherokee country, where stockade forts were erected for gathering in and holding the Indians preparatory to removal. From these, squads of troops were sent to search out with rifle and bayonet every small cabin hidden away in the coves or by the sides of mountain streams, to seize and bring in as prisoners all the occupants, however or wherever they might be found. Families at dinner were startled by the sudden gleam of bayonets in the doorway and rose up to be driven with blows and oaths along the weary miles of trail that led to the stockade. Men were seized in their fields or going along the road, women were taken from their wheels and children from their play. In many cases, on turning for one last look as they crossed the ridge, they saw their homes in flames, fired by the lawless rabble that followed on the heels of the soldiers to loot and pillage. So keen were these outlaws on the scent that in some instances they were driving off the cattle and other stock of the Indians almost before the soldiers had fairly started the owners in the other direction. Systematic hunts were made by the same men for Indians graves, to rob them of the silver pendants and other valuables deposited with the dead. A Georgia volunteer, afterward a colonel in the Confederate service, said: 'I fought through the civil war and have seen men shot to pieces and slaughtered by thousands, but the Cherokee removal was the cruelest work I ever knew'. Foreman, *Indian Removal* 287 (1932) *quoting* from J. Mooney, *Myths of the Cherokee* (Nineteenth Report, Bureau of American Ethnology, pt. I, Washington, 1900) at 130.

By the terms of the Treaty of New Echota the Cherokee Nation ceded to the United States all of the lands owned by it in the east, and agreed to remove to and unite with the western Cherokee on lands described in the treaty which the United States guaranteed and secured to be conveyed by patent to the Cherokee Nation and provided for the same reserved right to allow other tribes to use the salt plain (7 Stat. 478, arts. 1 and 2, 2 Kapp. 440).

Therein also the United States agreed that the Cherokee Nation would have the right of self government within its domain, and that the Cherokee Nation would "in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory". *Id.* at art. 5. The United States further promised that the Cherokee Nation would "be protected against interruption and intrusion from citizens of the United States, who may attempt to settle in the country without their consent; and all such persons shall be removed from the same by order of the President of the United States." *Id.* at art. 6.

The United States reserved a military reservation, providing;

> . . . should the United States abandon said post and have no further use of the same it shall revert to the Cherokee Nation. The United States shall always have the right to make and establish such post and military roads and forts in any part of the Cherokee country, as they may deem proper for the interest and protection of the same and the free use of as much land, timber, fuel and materials of all kinds for the construction and support of the same as may be necessary; provided that if the private rights of individuals are interferred with, just compensation therefor shall be made. (*Id.* art. 3).

On December 31, 1838, President Martin Van Buren issued the patent granting to the Cherokee Nation the fee simple title to the Cherokee domain in Indian Terri-

tory. (*See* App. D) After reciting the pertinent provisions of the Cherokee Treaties of May 6, 1828, February 14, 1833, and December 29, 1835 therein, the patent provided:

> THEREFORE, in execution of the agreements and stipulations contained in the said several treaties, the United States have GIVEN and GRANTED and by these presents do GIVE and GRANT, unto the said Cherokee nation, the two tracts of land so surveyed and herein before described, containing in the whole fourteen millions, three hundred and seventy-four thousand, one hundred and thirty-five acres and fourteen-hundredths of an acre:
>
> TO HAVE AND HOLD THE SAME together with the rights privileges and appurtenances thereunto belonging, to the said CHEROKEE NATION FOREVER, subject, however, to the right of the United States to permit other tribes of red men to get salt on the salt plain on the western prairie, referred to in the second article of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty five, which salt plains has been ascertained to be within the limits prescribed for the outlet agreed to be granted by the said article; and subject also to all the other rights reserved to the United States in and by the articles hereinbefore recited, to the extent and in the manner in which the said rights are reserved and subject also to the condition provided by the Act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty, referred to in the above recited third article, and which condition is that the lands hereby granted shall revert to the United States if the said Cherokee Nation ceases and abandons the same.

The United States made the following three reservation in the patent:

> "(1) the right to permit other tribes to get salt on the western part of the grant; (2) any rights to lands assigned the Quapaws which turned out to be

> within the bounds of these Cherokee lands; (3) the right to establish and maintain military posts and roads together with the free use of land, timber, fuel, and materials for the construction and support of those facilities . . ." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 636-637 (1970) (Mr. Justice Douglas, concurring).

Again in the Cherokee Treaty of July 19, 1866, 14 Stat. 799, 2 Kapp. 942, Article 2 provided that "The United States guarantee to the people of the Cherokee Nation the quiet and peaceable possession of their country"; and in Article 27 it was provided that the United States would remove persons not lawfully residing or sojourning within the Cherokee Nation, "as they now are, or hereafter may be, required by the Indian intercourse laws of the United States."

The white settlements eventually surrounded the Cherokee domain in the west, and in 1886, an expansionist Federal government attacked "as absurd" the Cherokee treaties and the solemn guarantees contained therein that the western Cherokee domain "in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory", and the right of the Cherokee Nation to self-government under its own laws. *Choctaw Nation*, 397 U.S. at 640-641 (1970).

To further this changed policy, by Act of March 3, 1893, ch. 209, 27 Stat. 612, 645, the United States appointed a commission to negotiate with the Five Civilized Tribes:

> . . . for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes

> aforesaid, or each of th
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The commission, known found all of these tribes qui wishes of the Government, *States*, 102 Ct. Cl. 565, 62 years, the tribes fought the execute such agreements wit what is known as the Curtis 30 Stat. 495, directing such forced to execute agreemen ment. *Creek Nation v. Unit* 238, 255-258 (1970).

The Cherokee Nation cont States, without its consent, tive control over its propert visions of the Curtis Act o Stat. 495. However, this C *Hitchcock*, 187 U.S. 294, Congress, under its plenary had authority to do so. The out at p. 307, that "There i case as to the taking of prope

The Cherokee Nation ult July 1, 1902, ch. 1375, 32 allotment of the tribal lan the Cherokee Nation. Unde assumed full administrative erty and affairs of the Cher provisions of the Curtis Act *Nation v. Hitchcock*, 187 U.S

m, with the United States, adjustment, upon the basis s may, with the consent of Indians, so far as may be d suitable to enable the ulti- or States of the Union which ithin said Indian Territory.

as the Dawes Commission, e reluctant to accede to the *Seminole Nation v. United* -629 (1945), and for some fforts of the Commission to them. But Congress passed Act, June 28, 1898, ch. 517, hanges, and the tribes were s with the Federal govern- *d States*, 24 Ind. Cl. Comm.

sted the right of the United o take over full administra- and affairs under the pro- June 28, 1898, ch. 517, 30 urt, in *Cherokee Nation v.* 06, 307 (1902), held that power over Indian Affairs, Court was careful to point no question involved in this ty".

mately accepted the Act of tat. 716, providing for the s to individual members of this Act the United States control over all of the prop- kee Nation to carry out the and the 1902 Act. *Cherokee* at 306-308.

The bed of the Arkansas River was not allotted, and under the patent issued by the United States to the Cherokee Nation in 1838 the fee simple title to the Arkansas riverbed was vested in the Cherokee Nation, and held in trust by the United States for the use and benefit of the Cherokee Nation, its dependent Indian ward. *Choctaw Nation v. United States*, 397 U.S. 620, 627 (1970).

In the Five Civilized Tribes Act of 1906 providing for the final disposition of tribal affairs Congress declared that tribal lands would become trust property:

> That the lands belonging to the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes, upon the dissolution of said tribes, *shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians* . . . (Underscoring ours)

Act of April 26, 1906, ch. 1876, 34 Stat. 137, 148, Section 27.

SUMMARY OF ARGUMENT

A fiduciary relationship existed between the United States and the Cherokee Nation, the United States being the trustee, and the Cherokee Nation, being its dependent Indian ward. In its dealings with this dependent Indian ward, the conduct of the United States as disclosed in the acts of those who represent it should be judged by the "most exacting fiduciary standards".

As such trustee, the United States has full power to control and manage the property and affairs of an Indian tribe, and can take all measures for protecting and advancing the tribe, but it cannot constitutionally give tribal lands to others, or appropriate them to its own purposes, without the payment of just compensation therefor under the Fifth Amendment to the Constitution of the United States.

The Cherokee Treaties of 1828, 1833 and 1835 disclose an intent by both the United States and the Chero-

kee Nation to separate permanently the Cherokee domain in Indian Territory from the States or Territories; and to give the Cherokee Nation the full right of self-government under its own tribal laws; in fact, to make it an "independent country". *Atlantic and Pacific R. Co. v. Mingus*, 165 U.S. 413, 435-436 (1897).

The United States made no provision for a navigational easement in these Cherokee Treaties, nor did it do so in the patent of 1838; and, therefore, the Cherokee Nation was granted the fee simple title to the bed of the Arkansas River within its domain, and it became private property subject only to the laws of the Cherokee Nation.

The treaties with the Indians must be interpreted as they would have understood them, and any doubtful expressions in them should be resolved in the Indians' favor. *See*, e.g. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631, 642 (1970); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918).

As the grant of fee simple title to the Arkansas riverbed to the Cherokee Nation came directly from the United States, the equal footing doctrine and rights acquired thereunder have no application to these Cherokee tribal lands; and neither the State of Oklahoma nor any riparian owner under that State's laws, acquired any rights in the Arkansas riverbed within the Cherokee domain.

When the officers of the United States, under authority of the Flood Control Act of 1944, and the Rivers and Harbors Act of 1946, entered upon the privately owned Arkansas riverbed of the Cherokee Nation, and without its consent, destroyed the sand and gravel assets, and built three dams on said lands, without providing for the payment of just compensation therefor, the United States, as trustee for the Cherokee Nation, appropriated said riverbed lands for its own public purposes, and under the decisions quoted herein must make just compen-

sation to the Cherokee Nation, the Indian ward, for the tribal lands taken, according to the Fifth Amendment to the Constitution of the United States.

ARGUMENT

PLAINTIFF'S LEGAL AND EQUITABLE CLAIM UNDER CLAUSES 1 AND 4 INDIAN CLAIMS COMMISSION ACT

Plaintiff has alleged and claims that the United States, through action of its executive branches—the Corps of U.S. Army Engineers and the Southwest Power Administration—has "taken" that portion of its Arkansas riverbed involved herein, and owned by plaintiff in fee simple, under the Flood Control Act of December 22, 1944, 58 Stat. 887, 895, and the Rivers and Harbors Act of July 24, 1946, 60 Stat. 634, 635-636, for its own public uses, without the consent of plaintiff, and without the payment to plaintiff of just compensation therefor, in violation of the Fifth Amendment to the Constitution of the United States. (Jt. Append. 6). An examination of these Acts shows that no compensation was provided therein to pay the Cherokee Nation for this Cherokee tribal property thus taken, which as of the date of taking, constituted property held in trust by the United States for its dependent Indian ward.

This is a legal and equitable claim under clauses 1 and 4 of the Indian Claims Commission Act, ch. 959, 60 Stat. 1049-50, arising out of Cherokee treaties, Acts to Congress and the Constitution of the United States. (Br. Op. Cert. App. C 9a).

A. The Fiduciary Relationship

This case is unique in that a *fiduciary relationship* exists between the United States and the Cherokee Nation of Oklahoma, and constitutes an essential element to be considered by this Court in the decision of this case.

In defining this trust relationship of the United States toward its Indian wards, this Court, in *Seminole Nation v. United States*, 316 U.S. 286 (1942), at pages 296-297, stated:

> Furthermore, this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. E.g. *Cherokee Nation v. Georgia*, 5 Pet. 1; *United States v. Kagama*, 118 U.S. 375; *Choctaw Nation v. United States*, 119 U.S. 1; *United States v. Pelican*, 232 U.S. 442; *United States v. Creek Nation*, 295 U.S. 103; *Tulee v. Washington*, 315 U.S. 681. In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the *most exacting fiduciary standards.* (emphasis added).

In support of this holding this Court quoted the classic definition of the fiduciary relationship by Chief Judge (later Mr. Justice) Cardozo in *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928):

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honestly alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. . . . Only thus has the level of conduct

> for fiduciaries been kept at a level higher than that trodden by the crowd.

This trust relationship, applicable to this case, creates a duty in the United States to control and manage tribal interests. This duty to control and manage cannot be obviated by a servitude the existence of which was never mentioned in the same treaties and patent which established vested Cherokee property rights. The United States offers no explanation for its abandonment of this duty.

B. The Fifth Amendment Taking

The Flood Control Act of December 22, 1944, 58 Stat. 887, 895, and the Rivers and Harbors Act of July 24, 1946, 60 Stat. 634, 635-36, provided no compensation to the Cherokee Nation for its Arkansas riverbed lands taken by the United States for its own public purposes. The Cherokee Nation would submit that when trust lands of an Indian tribe are taken under acts of Congress which provide for no just compensation to be paid the tribe therefor, the United States becomes liable to the tribe for the taking under the Fifth Amendment to the Constitution of the United States.

In *United States v. Creek Nation*, 295 U.S. 103 (1935), this Court held that as guardian of the property of an Indian tribe the United States can manage and control the trust property, but it cannot give it away to others *or use it for its own purposes* without becoming liable to the tribe therefor. This Court stated:

> A question is raised as to whether there was an appropriation or taking of the lands by the United States. The Creek tribe had a fee simple title, not the usual Indian right of occupancy with the fee in the United States. That title was acquired and held under treaties, in one of which the United States guaranteed to the tribe quiet possession. The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and man-

> agement of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that "would not be an exercise of guardianship, but an act of confiscation". *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113; *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307-308.
>
> Such was the situation when the lands in question were disposed of under the Act of 1891. The disposals were made on behalf of the United States by officers to whom it had committed the administration of that act, and were consummated by the issue of patents signed by the President.
>
> . . . .
>
> We conclude that the lands were appropriated by the United States in circumstances which involved an implied understanding by it to make just compensation to the tribe.

Id. at 109-11.

This case has been followed in many subsequent cases. In the recent case of *Sioux Nation v. United States*, 220 Ct. Cls. 442, 465 (1979), affirmed in *United States v. Sioux Nation*, 448 U.S. 371 (1980), the lands of the Sioux Nation were "taken" under an act of Congress that did not provide for just compensation to be paid to the tribe therefor. In its decision this Court quoted from the decision in the Creek Nation case, and awarded the tribe the fair market value of the lands taken under the Act of February 28, 1877, plus an increment to that value to make the tribe whole as of today for a taking that occurred in 1877.

The court in *Fort Berthold Reservation v. United States*, 182 Ct. Cl. 543, 390 F. 2d 686 (1968), stated, at pp. 553 and 557:

> It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary powers over the Indians and their property, as it thinks is in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indians' property within the meaning of the Fifth Amendment to the Constitution. In any given situation in which Congress has acted with regard to Indian people, it must have acted either in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time.
>
> . . .
>
> In short, it is concluded that it is the good faith effort on the part of Congress to give the Indians the full value of their land that identifies the exercise by Congress of its plenary authority to manage the property of its Indian wards for their benefit. Without that effort, Congress would be exercising its power of eminent domain by giving or selling Indian land to others, by dealing with it as its own, or by any other act constituting a taking.

In neither the Flood Control Act of 1944, nor the Rivers and Harbors Act of 1946 was any provision made for payment to the Cherokee Nation for the construction of the three dams on the Arkansas riverbed owned in fee simple by the Cherokee Nation. More importantly, there is no showing of legislative intent to appropriate tribal trust property without compensation.[10] Certainly the United States can directly appropriate Cherokee prop-

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[10] In fact, until the Cherokee Nation successfully quieted its title to the bed and banks of the Arkansas River, it was widely believed that the State of Oklahoma held title to the same. *State v. Nolegs*, 139 P. 943, 945 (1914); *Vickery v. Yahola Sand and Gravel Co.*, 12 P.2d 881, 882 (1932); *Lynch v. Clements*, 263 P.2d 153, 156-57 (1953).

erty through condemnation, an inherent power of sovereignty to which the Cherokees have always been subject. *Federal Power Com. v. Tuscarora Indian Nation*, 362 U.S. 99, 120-21 (1960); *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U.S. 641 (1890).[11] However, to take confirmed tribal property rights held in trust by the United States, this Court has required the same clear expression of legislative intent as required to abrogate treaties.[12] Moreover, this Court has never permitted the appropriation of tribal trust property without just compensation.

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[11] The Tuscaroras held title in fee with no interest in the United States. Their title came from an independent third party and was "freed from the effects of all then existing treaties". 121 n. 18.

[12] In *United States v. Santa Fe Pacific Ry.*, 314 U.S. 339 (1941), a unanimous Court opinion by Justice Douglas, declined to construe certain statutes as abrogating Indian property rights to lands over which the railroad claimed a right of way. This Court held that "an extinquishment [of Indian title] cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." (*Id.* at 354). Also this Court has observed that the usual principle that tax exemptions should be narrowly construed should yield to a "liberal" resolution of "doubtful expressions . . . in favor of a weak and defenseless people, who are wards of the nation . . ." *Choate v. Trapp*, 224 U.S. 665, 675 (1912). See *Squire v. Capoeman*, 351 U.S. 1 (1956). Similarly an act of Congress establishing a reservation on "the body of lands known as Annette Islands" was decided by this Court to include adjacent waters and submerged lands as "the Indians could not sustain themselves from the use of the upland alone." *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918). See also *Moore v. United States*, 157 F.2d 760 (9th Cir. 1946).

In one recent decision, *Menominee Tribe v. United States*, 391 U.S. 404 (1968), this Court has held that a reservation created by treaty which stated the lands "be held as Indian lands are held" implicitly included hunting and fishing rights. (*Id.* at 405-406). This Court also held that these rights were not annulled by a subsequent act terminating the federal guardianship over the tribe, even though the act was silent as to preservation of these rights. (*Id.* at 412-413). *See*, generally, Chambers, Judicial Enforcement of the Federal Trust Responsibility to Indians, 27 Stan. L. Rev. 1213 (1975).

It would be wholly inconsistent with the purpose and plain meaning of the treaties and patent to allow the federal government to construct a vast navigation way over tribal trust property "without rendering, or assuming an obligation to render, just compensation . . ." *Creek Nation*, 295 U.S. at 110. This Cherokee tribal property was held in trust by the United States for its Indian ward, the Cherokee Nation, and said lands were taken by the United States for its own public purposes without the consent of the Cherokee Nation, and without the payment of just compensation to the Cherokee Nation therefor, in violation of the Fifth Amendment to the Constitution of the United States. For these takings, the United States is liable to its dependent Indian ward in violation of its duties as guardian of the Cherokee Nation, under the well established principles set forth in the above *Creek*, *Sioux* and *Fort Berthold Reservation* decisions.

C. Navigational Servitude

Notwithstanding the long established principles governing the fiduciary relationship existing between the United States and the Cherokee Nation, set forth above, the United States now contends that it can invoke a navigational servitude in the riverbed of the Arkansas River located in the domain of the Cherokee Nation, and that it can confiscate this Cherokee tribal property, held in trust by the United States for the Cherokee Nation, under the Flood Control Act of 1944 and the Rivers and Harbors Act of 1946, and use it for public purposes of the United States, without assuming any obligation to pay compensation to its dependent Indian ward. This contention ignores the historical basis for the doctrine of navigational servitude. When the United States conveyed fee simple title to the navigable Arkansas River to the Cherokee Nation, it no longer had a reason to retain a navigational servitude. In view of the treaty promises the river was not intended as a public highway or artery of commerce. The Cherokee Nation does not dispute that the naviga-

tional servitude is a vestige of sovereignty; it is the responsibility of the sovereign to hold public waterways and to improve them for all the people. However, when the sovereign totally conveys away such property to achieve a valid public purpose, the reason for the servitude ceases. Indeed, such a servitude cannot be implied in this case for to do so would undercut the very heart of the treaty promises made. *Jones v. Meehan*, 175 U.S. 1 (1899); *Blue Jacket v. Johnson County*, 72 U.S. (5 Wall.) 737 (1867). Once conveyed to the Cherokee Nation, the bed of the Arkansas River, while not subject to any servitude, was like any other Indian property, *subject to the power* of the United States to be taken under the Constitution.

Both the navigational easement and the power to regulate Indian affairs have their origin in the same commerce clause of the United States Constitution. In *Creek Nation v. United States*, 78 Ct.Cl. 474 (1933), at p. 485, the Court of Claims held:

> That Congress has plenary power over the administration of Indian affairs is well settled. *Cherokee Nation v. Georgia*, 5 Pet. 1; *Cherokee Nation v. Hitchcock*, 187 U.S. 294; *Lone Wolf v. Hitchcock*, 187 U.S. 553. . . .

This power is not absolute, but subject to "pertinent constitutional restrictions". *United States v. Creek Nation*, 295 U.S. 103, 110 (1935); *United States v. Cress*, 243 U.S. 316, 326 (1916).

In this case, the court of appeals held, consistent with *Choctaw Nation*, that although the navigational easement was not expressly reserved in the Cherokee patent, the power to exercise it existed, but:

> When the exercise of that public power affects private ownership rights not connected to a navigational use, the court must balance the public and private interests to decide whether just compensation is due.

> *The navigational servitude is not without constitutional limitation.* Furthermore, if Indian property is taken for non-Indian use within this context, constitutional strictures are equally applicable.

782 F.2d 871 (10th Cir. 1986); Pet. for Cert., App. A, 10a.

The circuit court's holding follows this Court's opinion in *United States v. Cress*, 243 U. S. 316 (1916), wherein it was held that the navigational servitude is not absolute, but is subject to the 5th Amendment when private property is taken thereunder for public purposes. This Court stated, at page 326:

> "But the authority to make such improvements is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power like others, must be exercised, when private property is taken, in subordination to the 5th Amendment." [citing Monongahela Nav. Co. v. United States, 148 U. S. 312, 336].

This Court in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), has also recognized that the navigational easement is not absolute:

> . . . (T)his Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."

Id. at 175, citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). The United States admits this (Brief at 22). When the public right of free passage operates to destroy Cherokee property then "justice and fairness" compel compensation by the government.

In *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), this Court held that by the patent to the Cherokee Nation

the United States granted the Arkansas riverbed to the Cherokee Nation without reservation; and that these Cherokee tribal lands were held in trust by the United States for the Cherokee Nation. In doing so, the majority opinion stated:

> As a practical matter, reservation of the river bed would have meant that petitioners were not entitled to enter upon and take sand and gravel or other minerals from the shallow parts of the river or islands formed when the water was low. In many respects however, the Indians were promised virtually complete sovereignty over their new lands. See Atlantic & Pacific R. Co. v. Mingus, 165 US 413, 435-436, 41 L Ed 770, 779, 17 S Ct 348 (1897). We do not believe that petitioners would have considered that they could have been precluded from exercising these basic ownership rights to the river bed, and we think it very unlikely that the United States intended otherwise. Nor do we believe that the United States would intend that it rather than petitioners have title to the dry bed left from avulsive changes of the river's course, which as the District Court noted are common in this area. Indeed, the United States seems to have had no present interest in retaining title to the river bed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce. Cf. Pollard v. Hagan, 3 How. 212, 229, 11 L Ed 565, 573 (1845).

Id. at 635.

The reference in *Choctaw* to the navigational easement in this privately owned riverbed was not related to the issues. Rights were being determined between the Cherokee Nation and Oklahoma and certain lessees. Indeed, the issues in *Choctaw* were limited to the status of present title to the riverbed and the application of the equal footing doctrine. The issues of navigational servitude, trust responsibility, and just compensation were not fully briefed or argued to this Court in *Choctaw*. More importantly, the servitude's right-of-way for navigation

would not be affected even if this Court determines the Cherokees rights are compensable. "In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access . . . if it chose. Whether a statute or regulation that went so far amounted to a 'taking', however, is an entirely separate question". *Kaiser Aetna*, 444 U.S. at 174 (citations omitted).

Under the doctrines articulated by this Court in *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77 (1922), the United States as sovereign in the accomplishment of a valid public purpose was unrestricted in its ability to transfer fee simple title in what might be otherwise considered "public lands." It was also made clear that title once vested cannot be divested. *Id.* at 88. The "constitutional principal of equality among the several states," *United States v. Holt State Bank*, 270 U.S. 49, 55 (1925), insures that "the navigable waters and the soils under, . . . shall be and remain public highways; and being chiefly valuable for the public purposes of commerce, navigation and fishing, . . . shall not be granted away . . ." *Brewer-Elliott*, 260 U.S. at 35, *citing Shively v. Bowlby*, 152 U.S. 1, 48 (1894). By a parity of reasoning having transferred fee simple title absolutely, with the promise of freedom from State jurisdiction, the United States Government cannot now impose restrictions or servitudes which were not set forth in the treaties or patent. The United States in its sovereign authority under Article 1, Section 8, Clause 3 of the Constitution transferred fee simple title to the Cherokee domain subject to limited specific easements and right of passage. There was no navigational servitude mentioned. Clearly a navigational servitude for the general public would be inconsistent with the basic premises of the treaties and patent and violative of the promises made to the Cherokee Nation.

The navigational servitude is an implied right of the United States arising from judicial construction of the

interstate commerce clause.[13] The right has since been applied only to navigable *public* streams, and has not been applied to *private* streams, such as that part of the Arkansas River owned in fee simple by the Cherokee Nation. In the East, before its forced migration, the Cherokee Nation controlled all water courses within its domain, and it certainly would have intended to have the same control over the water courses in the West which were exchanged for those in the East; particularly in light of the fact that the United States solemnly promised the Cherokee Nation in its treaties that no state or territory would be created encompassing its western domain without its consent, and that all intruders would be expelled from its domain in the West.

The patent of the United States granting the absolute fee simple title of the Arkansas riverbed to the Cherokee Nation within its domain, pursuant to the solemn promises in the Cherokee treaties of 1828, 1833 and 1835, was issued on December 31, 1838. *Cherokee Nation v. United States*, 9 Ind. Cl. Comm. 162, 163 (1961). Therein the United States made no mention of a navigational servitude in that part of the Arkansas riverbed covered by the patent. It is evident from the historical course of dealing with the Cherokee Nation that the United States made specific reservation of access through their lands. The Arkansas River never was mentioned except by reference to metes and bounds description.

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[13] *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824). *Gibbons* recognized the navigation power as a court-created incident of the constitutional power to regulate interstate commerce. However, it was not until this Court's pronouncement in *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851), that navigable waters were recognized as extending beyond tidal waters for purposes of admiralty jurisdiction. Later, for purposes of navigation, "navigable-in-fact" was considered navigable in law. *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870). This judicial construction arose subsequent to the fee patent of 1838, executed by President Martin Van Buren to the Cherokee Nation.

D. The Taking of Private Property and the Right of Navigation

While the Cherokee Nation is subject to the Constitution and all that it entails, its property is not subject to the servitude without payment of consideration for destroyed property rights. The United States must invoke its power of eminent domain and make just compensation.

The navigational easement has been applied solely to public navigable waters of the United States, or such waters as were transferred to the States under the equal footing doctrine. As this Court held, this equal footing doctrine did not apply to that portion of the Arkansas riverbed conveyed in fee simple to the Cherokee Nation by patent in 1838, long before the State of Oklahoma came into existence and entered the Union in 1907. *Choctaw Nation v. Oklahoma*, 397 U.S. at 635.

The case of *Montana v. United States*, 450 U.S. 544 (1981), and other similar cases cited herein by the Government, has no application to the present proceedings. In *Montana* the state acquired the bed of a navigable *public* stream under the equal footing doctrine, subject to the navigational easement of the United States. The treaty involved in *Montana* failed to overcome the presumption of the equal footing doctrine that the Government held lands under navigable waters in trust for future states. *Id.* at 553. No direct grant of fee simple title from the United States to an Indian tribe, including the riverbed of a navigable stream, was involved. Moreover, *Montana* did not address the taking of tribal trust property within the Big Horn River, since no property rights were involved. In fact, neither *Montana* nor *Choctaw* discussed the central issue here; whether compensation would be due for a "taking" of tribal trust property for use in a navigation way.

This Court in *Montana* distinguished *Choctaw*, stating in part: ". . . the finding of a conveyance of the riverbed

in Choctaw Nation was based on very peculiar circumstances not present in this case." *Id.* at 555, n. 5. The decision noted the repeated betrayal by the Government and that Georgia and Mississippi were "anxious for the relocation westward". (ibid.) After viewing these special circumstances this Court stated:

> Neither the special historical origins of the Choctaw and Cherokee treaties nor the crucial provisions granting Indian lands in fee simple and promising freedom from state jurisdiction in those treaties have any counterparts in the terms and circumstances of the Crow treaties of 1851 and 1868. (*Ibid.*)

As with the *Montana* case, the other cases cited by the Government have no application to this Cherokee case.[14] They involve no direct grant of fee simple title from the United States to the Indian tribe; and apply solely to *public* streams acquired under the equal footing doctrine, which are subject to the navigational easement of the United States. In this Cherokee case, by direct grant, the United States transferred fee simple title to the Arkansas riverbed to the Cherokee Nation, and the equal footing doctrine does not apply. The United States agreed that the Cherokee Nation would have the right of self-government within its domain, and that its western domain would "in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory." Treaty of New Echota, Art. 5. The promise of freedom from state jurisdiction evidences the inapplicability of the equal footing doctrine in that land never intended to become a part of any state cannot now be presumed to have been reserved by the United States for the benefit of future states. No future state was contemplated in 1838. Other cases cited by appellant involve no fiduciary relationship between the parties, nor was the injured party an Indian nation to whom the United States had made specific promises and, more signifi-

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[14] Brief of United States, 20 n.14.

cantly, in none of these cases has the United States undertaken the care and protection of the injured party.

The recent case of *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), sheds considerable light upon the issues herein presented, even though a fiduciary relationship did not exist between the parties. Therein this Court held that the navigational easement of the United States was not absolute, and that when a privately owned navigable waterway was taken by the United States thereunder, the United States was required to pay just compensation therefor under the Fifth Amendment to the Constitution of the United States. In *Kaiser Aetna*, an owner of a shallow fish pond converted it into a navigable waterway by dredging a channel through it to a navigable bay, an outlet to the Pacific Ocean. The United States asserted its navigational easement in the converted fish pond. This Court held that the United States could not convert this private property into a public waterway without effecting a "taking" under the power of eminent domain, which required the payment of just compensation to the fee owner therefor, under the Fifth Amendment to the Constitution of the United States. In so holding, this Court stated:

> As the District Court aptly stated, "any reliance upon judicial precedent must be predicated upon careful appraisal of the purpose for which the concept of 'navigability' was invoked in a particular case".

Id. at 171. Further this Court concluded:

> . . . In this case, we hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within the category of interest that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result

> in an actual physical invasion of the privately owned marina. . . . Thus, if the Government wishes to make what was formerly Kuapa Pond into a public aquatic park after petitioners have proceeded as far as they have here, it may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredged pond . . . .

Id. at 179-80.

In *Kaiser Aetna* this Court mentioned the cost to the fee title owner in dredging to create a navigable waterway of the private pond. If such consideration constitutes a factor, The Cherokee Nation paid a far greater cost for securing its privacy in that portion of the Arkansas riverbed within the Cherokee domain in the west. The large majority of the Cherokee Nation suffered the forced removal from their farms and homes in a mild climate, and the loss of their personal property. In traveling over muddy and snow covered roads, without adequate clothing and food, the Cherokees also suffered the loss of the lives of many of their members—men, women and children. *See*, G. Foreman, *Indian Removal*, 294-312 (New Ed. 1953).

In this Cherokee case the United States in 1838 conveyed by patent to the Cherokee Nation the absolute fee simple title to the Arkansas riverbed within the Cherokee domain, in accordance with its solemn promises contained in the Cherokee treaties of 1828, 1833, and 1835. No navigational easement in said portion of the Arkansas riverbed was mentioned in the patent, treaties, or in the negotiations leading to these treaties with the Cherokee Nation. Therefore, that portion of the Arkansas riverbed located within the Cherokee domain became the absolute private property of the Cherokee Nation. Just as Kuapa Pond in *Kaiser Aetna* had always been considered private property under Hawaiian law, that portion of the Arkansas riverbed within Cherokee domain, was consid-

ered to be the private property of the Cherokees pursuant to their treaty rights.

The Cherokee "right to exclude" was guaranteed by treaty and patent. Fee simple title coupled with the promises that the Cherokees land would be "protected against interruption and intrusion from citizens of the United States" and "never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State," created more than an "economic advantage". Rather, an economic advantage "that has the law back of it to such an extent that courts may 'compel others to forbear from interfering with [it] or to compensate for [its] invasion.'" *Kaiser Aetna*, 444 U.S. at 178, *citing United States v. Willow River Power Co.*, 324 U.S. 499, 502. More than seventy years after this treaty Congress reconfirmed the private status of Cherokee property: "that the lands belonging to the . . . Cherokee . . . shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians . . . ." Act of April 26, 1906, ch. 1876, 34 Stat. 137, Section 27.

When the United States Corps of Army Engineers, under the Flood Control Act of 1944 and the Rivers and Harbors Act of 1946, entered this privately owned waterway without the consent of the fee title owner, altered its natural course, dredged a main channel, destroyed the valuable sand and gravel assets of the Cherokee Nation, rendered oil, gas, and coal deposits inaccessable; and built three dams on the riverbed, the United States took this private property from the Cherokee Nation and converted it to its own public uses; and, therefore, it is required to pay just compensation to the Cherokee Nation, the fee title owner, under the Fifth Amendment to the Constitution of the United States.

The Government herein seeks to impose the servitude without the commensurate duty to pay by ignoring a cru-

cial fact: that a *fiduciary relationship* existed between the United States, the guardian, and the Cherokee Nation, the dependent Indian ward, which required the United States to manage and control and advance and preserve the trust property for the benefit of its Indian ward. When the United States took this trust property for its own public uses, that was not an act of guardianship, but an act of confiscation; and, therefore, the United States was required to pay just compensation therefore under the Fifth Amendment to the Constitution of the United States. *United States v. Creek Nation*, 295 U.S. 103 (1935); *Fort Berthold Reservation v. United States*, 182 Ct. Cl. 543, 390 F.2d 686 (1968): *United States v. Sioux Nation*, 448 U.S. 371 (1980).

As Mr. Justice Black so ably dissented in *Federal Power Com. v. Tuscarora*, 362 U.S. at 142:

> There may be instances in which Congress has broken faith with the Indians, although examples of such actions have not been pointed out to us. Whether it has done so before now or not, however, I am not convinced that it has done so here. I regret that this Court is to be the governmental agency that breaks faith with this dependent people. Great nations, like great men, should keep their word.

Finally, the Government argues that the Cherokees have already admitted the servitude applies to the Arkansas. The Cherokee Nation certainly does not disown previous statements to this Court. However, the United States overlooks the crucial question in this case: whether the United States may impose the servitude without compensation. The United States supported the Cherokees in their claim to establish their property interests in the riverbed. Now the United States has abandoned them in this, their just claim for destruction of those same property rights. The Cherokee Nation never admitted that no compensation was due. Congress itself recognized the right of the Cherokee Nation to seek legal remedy by enacting the special jurisdictional act permitting this

suit. Act of December 23, 1982, Pub. L. No. 99-385, 96 Stat. 1944. Brief in Opp. Cert. App. B, 7a.

CONCLUSION

For the reasons set forth above, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

TREATY WITH THE WESTERN CHEROKEE, 1828.

May 6, 1828, 7 Stat. 311, 2 Kapp. 288

WHEREAS, it being the anxious desire of the Government of the United States to secure to the Cherokee nation of Indians, as well those now living within the limits of the Territory of Arkansas, as those of their friends and brothers who reside in States East of the Mississippi, and who may wish to join their brothers of the West, *a permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State; and, Whereas, the present location of the Cherokees in Arkansas being unfavorable to their present repose, and tending, as the past demonstrates, to their future degradation and misery; and the Cherokee being anxious to avoid such consequences, and yet not questioning their right to their lands in Arkansas, as secured to them by Treaty, and resting also upon the pledges given them by the President of the United States, and the Secretary of War, of March, 1818, and 8th October, 1821, in regard to the outlet to the West, and as may be seen on referring to the records of the War Department, still being anxious to secure a permanent home, and to free themselves, and their posterity, from an embarrassing connexion with the Territory of Arkansas, and guard themselves from such connexions in future; and, Whereas, it being important, not to the Cherokees only, but also to the Choctaws, and

in regard also to the question which may be agitated in the future respecting the location of the latter, as well as the former, within the limits of the Territory or State of Arkansas, as the case may be, and their removal therefrom; and to avoid the cost which may attend negotiations to rid the Territory or State of Arkansas whenever it may become a State, of either, or both of those Tribes, the parties hereto do hereby conclude the following Articles, viz:

* * * *

ART. 2. The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is hereby solemnly pledged, of seven millions of acres of land, to be bounded as follows, viz: [descriptions omitted]

* * * In addition * * * the United States further guarantee to the Cherokee Nation a perpetual outlet, West, and a free and unmolested use of all the Country lying West of the Western boundary of the above described limits, and as far West as the sovereignty of the United States, and their right of soil extended.

ART. 3. The United States agree to have the lines of the above cession run without delay, say not later than the first of October next, and to remove, immediately after the running of the Eastern line from the Arkansas River to the South-West corner of Missouri, all white persons from the West to the East of said line, and also all others, should there be any there, who may be unacceptable to the Cherokees, so that no obstacles arising out of the presence of a white population, or a population of any other sort, shall exist to annoy the Cherokees—and also to keep all such from the West of said line in future.

* * * *

ART. 8. The Cherokee Nation, West of the Mississippi having, by this agreement, freed themselves from the harassing and ruinous effects consequent upon a location

BEST A

amidst a white population, and secured to themselves and their posterity, under the solemn sanction of the guarantee of the United States, as contained in this agreement, a large extent of unembarrassed country; and that their Brothers yet remaining in the States may be induced to join them and enjoy the repose and blessings of such a State in the future, it is further agreed, on the part of the United States, that to each Head of a Cherokee family now residing within the chartered limits of Georgia, or of either of the States, East of the Mississippi, who may desire to remove West, shall be given, on enrolling himself for emigration, a good Rifle, a Blanket, and Kettle, and five pounds of Tobacco: (and to each member of his family one Blanket,) also, a just compensation for the property he may abandon, to be assessed by persons to be appointed by the President of the United States. * * *

ART. 9. It is understood and agreed by the parties to this Convention, that a Tract of Land, two miles wide and six miles long, shall be, and the same is hereby, reserved for the use and benefit of the United States, for the accommodation of the military force which is now, or which may hereafter be, stationed at Fort Gibson, on the Neasho, or Grand River, to commence on said River half a mile below the aforesaid Fort, and to run thence due East two miles, thence Northwardly six miles, to a point which shall be two mile distant from the River aforesaid, thence due West to the said River, and down it to the place of beginning. And the Cherokees agree that the United States shall have and possess the right of establishing a road through their country for the purpose of having a free and unmolested way to and from said Fort.

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APPENDIX B

TREATY WITH THE WESTERN CHEROKEE, 1833.

February 14, 1833, 7 Stat. 414, 2 Kapp. 385

WHEREAS articles of convention were concluded at the city of Washington, on the sixth day of May one thousand eight hundred and twenty-eight, between James Barbour Secretary of War, being specially authorized therefor by the President of the United States, and the chiefs and head men of the Cherokee nation of Indians west of the Mississippi, which articles of convention were duly ratified. And whereas it was agreed by the second article of said convention as follows "That the United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is solemnly pledged, of seven millions of acres of land, said land to be bounded as follows; [description omitted] * * * The United States further guarantee to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary of the above-described limits; and as far west, as the sovereignty of the United States and their right of soil extend. * * *

ARTICLE I. The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee, is hereby pledged, of seven millions of acres of land, to be bounded as follows viz: [description omitted] * * *. In addition to the seven millions of acres of land, thus provided for, and bounded, the United States, further guarantee to the Cherokee nation, a perpetual outlet west and a free and unmolested use of all the country lying west, of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend—

Provided however, that if the saline, or salt plain, on the great western prairie, shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men, to get salt on said plain in common with the Cheerokees—and letters patent shall be issued by the United States as soon as practicable for the land hereby guaranteed.

APPENDIX C

TREATY WITH THE CHEROKEE, 1835.

December 29, 1835, 7 Stat. 478, 2 Kapp. 439

WHEREAS the Cherokees are anxious to make some arrangements with the Government of the United States whereby the difficulties they have experienced by a residence within the settled parts of the United States under the jurisdiction and laws of the State Governments may be terminated and adjusted; and with a view to reuniting their people in one body and securing a permanent home for themselves and their posterity in the country selected by their forefathers without the territorial limits of the State sovereignties, and where they can establish and enjoy a government of their choice and perpetuate such a state of society as may be most consonant with their views, habits and condition; and as may tend to their individual comfort and their advancement in civilization.

* * * *

ARTICLE 1. The Cherokee nation hereby cede relinquish and convey to the United States all the lands owned claimed or possessed by them east of the Mississippi river.
* * *

ARTICLE 2. Whereas by the treaty of May 6th 1828 and the supplementary treaty thereto of Feb. 14th 1833 with the Cherokees west of the Mississippi the United States guarantied and secured to be conveyed by patent, to the Cherokee nation of Indians the following tract of country [description omitted]. In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said seven

millions of acres, as far west as the sovereignty of the United States and their right of soil extend:

Provided however That if the saline or salt plain on the western prairie shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men to get salt on said plain in common with the Cherokees; And letters patent shall be issued by the United States as soon as practicable for the land hereby guarantied."

ARTICLE 3. The United States also agree that the lands above ceded by the treaty of Feb. 14 1833, including the outlet, and those ceded by this treaty shall all be included in one patent executed to the Cherokee nation of Indians by the President of the United States according to the provisions of the act of May 28 1830. It is, however, agreed that the military reservation at Fort Gibson shall be held by the United States. But should the United States abandon said post and have no further use for the same it shall revert to the Cherokee nation. The United States shall always have the right to make and establish such post and military roads and forts in any part of the Cherokee country, as they may deem proper for the interest and protection of the same and the free use of as much land, timber, fuel and materials of all kinds for the construction and support of the same as may be necessary; provided that if the private rights of individuals are interfered with, a just compensation therefor shall be made.

* * * *

ARTICLE 5. The United States hereby covenant and agree that the lands ceded to the Cherokee nation in the forgoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging

to their people or such persons as have connected themselves with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same.

ARTICLE 6. Perpetual peace and friendship shall exist between the citizens of the United States and the Cherokee Indians. The United States agree to protect the Cherokee nation from domestic strife and foreign enemies and against intestine wars between the several tribes. The Cherokees shall endeavor to preserve and maintain the peace of the country and not make war upon their neighbors they shall also be protected against interruption and intrusion from citizens of the United States, who may attempt to settle in the country without their consent; and all such persons shall be removed from the same by order of the President of the United States. But this is not intended to prevent the residence among them of useful farmers mechanics and teachers for the instruction of Indians according to treaty stipulations.

APPENDIX D

Excerpts—Cherokee Patent, 1838

THE UNITED STATES OF AMERICA
TO ALL TO WHOM THESE PRESENTS
SHALL COME, GREETING

WHEREAS, by certain treaties made by the United States of America with the Cherokee Nation of Indians** it was stipulated and agreed on the part of the United States,** the United States should guaranty, secure, and convey by Patent, to the said Cherokee Nation, certain tracts of land: the description of which tracts and the terms and conditions on which they were to be conveyed, are** in the words following, that is to say:—

"ARTICLE 2d WHEREAS, by the treaty of May sixth, one thousand eight hundred and twenty-eight, and the supplementary treaty thereto of February fourteenth, one thousand eight hundred and thirty-three,** the United States guarantied and secured, to be conveyed by patent to the Cherokee nation of Indians,** SEVEN MILLIONS OF ACRES within the whole described boundaries.

In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee nation A PERPETUAL OUTLET WEST, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend.

PROVIDED, HOWEVER, that if the SALINE or SALT PLAIN on the western prairie shall fall within said limits** the right is reserved to the United States to

permit other tribes of red men to get salt on said plain, in common with the Cherokees.

And LETTERS PATENT, shall be issued by the United States as soon as practicable for the land hereby guarantied.

AND WHEREAS, it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi, the United States, in consideration of the sum of FIVE HUNDRED THOUSAND DOLLARS,** hereby covenant and agree to convey to the said Indians and their descendants, by Patent, in fee simple, the following additional tract of land situated between the west line of the State of Missouri and the Osage reservation, beginning at the southeast corner of the same, and runs north along the east line of the Osage lands fifty miles, to the northeast corner thereof; and thence east to the west line of the State of Missouri; thence with said line south fifty miles; thence west to the place of beginning; estimated to contain eight hundred thousand acres of land;**

ARTICLE 3d. The United States also agree, that the lands above ceded by the treaty of February fourteenth, one thousand eight hundred and thirty-three, including the outlet, and those ceded by this treaty, shall all be included in one PATENT, executed to the Cherokee nation of Indians by the President of the United States, according to the provisions of the Act of May twenty-eighth, one thousand eight hundred and thirty.**

The United States shall always have the right to make and establish such POST and MILITARY-ROADS and FORTS in any part of the Cherokee country as they may deem proper for the interest and protection of the same, and the free use of as much land, timber, fuel and materials of all kinds for the construction and support of the same, as may be necessary, Provided, that if the private

rights of individuals are interfered with, a just compensation therefor shall be made."—

AND WHEREAS, the United States have caused the said tract of Seven Millions of Acres, together with the said perpetual outlet, to be surveyed in one tract, the boundaries whereof are as follows: beginning at a mound of rocks four feet square** on what has been denominated the old western territorial line of Arkansas Territory twenty-five miles north of Arkansas river; thence south twenty-one miles and twenty eight chains, to a post on the north-east bank of the Verdigris river;** thence down the Verdigris river, on the northeast bank, with its meanders to the junction of Verdigris and Arkansas rivers; thence from the lower bank of Verdigris river on the north Bank of Arkansas river south forty-four degrees, thirteen minutes, east, fifty seven chains, to a post on the south bank of Arkansas opposite the eastern bank of Neosho river at its junction with Arkansas,** thence south fifty three degrees west, one mile, to a post** thence south eighteen degrees, eighteen minutes west thirty three miles, twenty-eight chains and eighty links, to a rock** thence south four miles, to a post, on the lower bank of the north fork of Canadian river, at its junction with Canadian river,*** thence down the Canadian river on its north bank to its junction with Arkansas river; thence down the main channel of Arkansas river to the western boundary of the State of Arkansas at the northern extremity of the eastern boundary of the lands of the Choctaws on the south bank of Arkansas river, four chains and fifty four links east of Fort Smith; thence north seven degrees twenty five minutes west with the western boundary of the State of Arkansas, seventy-six miles sixty four chains and fifty links, to the southwest corner of the State of Missouri; thence north, on the western boundary of the State of Missouri eight miles, forty nine chains and fifty links, to the north bank of Cowskin, or Seneca river, at a mound six feet square at base and five feet high**thence west on the southern

boundary of the lands of the Senecas, eleven miles and forty-eight chains, to a post on the east bank of Neosho river;** thence up Neosho river, with its meanders on the east bank, to the southern boundary of the Osage lands, thirty six chains and fifty links west of the southeast corner of the lands of the Osages, witnessed by a mound of rocks on the west bank of the Neosho river; thence west on the southern boundary of the Osage lands to the line dividing the territory of the United States from that of Mexico two hundred and eighty eight miles, thirteen chains and sixty six links, to a mound of earth six feet square** thence south along the line of the territory of the United States and of Mexico, sixty miles and twelve chains, to a mound of earth six feet square** thence east along the northern boundary of Creek lands, two hundred and seventy-three miles, fifty-five chains and sixty six links, to the beginning, containing within the Survey thirteen millions, five hundred and seventy four thousand, one hundred and thirty five acres and fourteen hundredths of an acre.—

AND WHEREAS, the United States have also caused the said tract of Eight hundred thousand acres, to be surveyed, and have ascertained the boundaries thereof**

THEREFORE, in execution of the agreements and stipulations contained in the said several treaties, the United States have GIVEN and GRANTED and by these presents do GIVE and GRANT, unto the said Cherokee nation, the two tracts of lands so surveyed and herein before described, containing in the whole fourteen millions, three hundred and seventy four thousand, one hundred and thirty-five acres and fourteen-hundredths of an acre:

TO HAVE AND TO HOLD THE SAME, together with the rights privileges and appurtenances thereunto belonging, to the said CHEROKEE NATION FOREVER, subject, however, to the right of the United States to permit other tribes of red men to get salt on the salt plain on the western prairie, referred to in the second article

of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty five, which salt plains has been ascertained to be within the limits prescribed for the outlet agreed to be granted by the said article; and subject also to all the other rights reserved to the United States in and by the articles hereinbefore recited, to the extent and in the manner in which the said rights are reserved and subject also to the condition provided by the Act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty, referred to in the above recited third article, and which condition is that the lands hereby granted shall revert to the United States if the said Cherokee Nation ceases and abandons the same.—

IN TESTIMONY WHEREOF, I, Martin Van Buren, PRESIDENT OF THE UNITED STATES OF AMERICA, have caused these letters to be made PATENT and the SEAL of the GENERAL LAND OFFICE to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the thirty-first day of December in the year our Lord one thousand eight hundred and thirty eight, and of the Independence of the United States, the sixty third.

By the President — M. VAN BUREN

M.M. GARLAND
Recorder of the General Land Office